



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: APRIL 24, 2023

IN THE MATTER OF:

Appeal Board No. 627811

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective October 6, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by TELCO CONSTRUCTION prior to October 6, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed January 31, 2023 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted by the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as a full-time laborer from July 11, 2022 through October 5, 2022. He worked from 7 am to 3 pm with a meal break at 9:30 am. He had received no warnings for lateness or sleeping on the job.

On October 5, 2022 at 6:43 am, the claimant sent a text to the site supervisor (BK) that he had been pulled over and he might late; he arrived between 7:45

to 8 am. The claimant was not ticketed. Later that day, the claimant fell asleep in his car during his meal break but a coworker (SM) woke him up by knocking on his car window approximately 30 minutes after his meal break ended. The claimant immediately returned to work. After his shift ended on October 5, BK discharged the claimant because he was late to work and was sleeping on the job. BK told the claimant that he was fired because he was too slow.

OPINION: The credible evidence establishes the employer discharged the claimant because he was late to work and was sleeping on the job on October 5, 2022. We note that the BK provided inconsistent testimony regarding whether the claimant was warned for lateness. He initially testified that the claimant was warned, but admitted during cross-examination that he had not warned the claimant. In addition, he admitted that he told the claimant that he was fired because he was too slow. As the claimant had not been warned for lateness or for sleeping on the job, we conclude that the claimant's actions are not considered misconduct for unemployment insurance purposes.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective October 6, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to October 6, 2022 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issue decided herein.

JUNE F. O'NEILL, MEMBER